We only want to do this once, right? *What happens when a convicted defendant claims ineffective assistance of counsel, and trial counsel declines to defend against it or admits ineffectiveness*

In a R.32 appeal, trial counsel might not want to provide an affidavit in defense of his effective performance, he might not want to discuss the case with the State before a court-ordered hearing, and he might actually be a witness for the defense.

This can happen in cases where trial counsel was not clearly ineffective during the proceedings leading up to conviction, and it can feel like the conviction is being undone when your case is no longer as strong as it was, and for no real due process reason.

One reason that trial counsel might not want to provide an affidavit is that he is being overly cautious regarding his duty of confidentiality. ABA Formal Opinion 10-456, Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim discourages defense attorneys from working with the State on a petition for post-conviction relief:

Although an ineffective assistance of counsel claim ordinarily waives the attorney-client privilege with regard to some otherwise privileged information, that information still is protected by Model Rule 1.6(a) unless the defendant gives informed consent to its disclosure or an exception to the confidentiality rule applies. Under Rule 1.6(b)(5), a lawyer may disclose information protected by the rule only if the lawyer "reasonably believes [it is] necessary" to do so in the lawyer's self-defense. The lawyer may have a reasonable need to disclose relevant client information in a judicial proceeding to prevent harm to the lawyer that may result from a finding of ineffective assistance of counsel. However, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable.

One possible solution is to explain that the outline provided in an affidavit amounts to an offer of proof to the court to let the judge know what trial counsel would testify to at the evidentiary hearing in response to the IAC allegations. No one is asking counsel to deliver their client's file to the prosecutor's office (though this happened in *Binney v. State*, 384 S.C. 539 (2009), and while the practice is criticized, the

South Carolina court did not seem to have a problem with it since the defendant's IAC claims were very broad.).

Note that in many of the Arizona IAC cases, it is a matter of fact that trial counsel has provided an affidavit, and the practice is not questioned.

In ***State v. Cuffle*, the Arizona Supreme Court explained that a defendant waives the attorney-client privilege if he claims that the attorney has rendered ineffective assistance. Such a claim "is a direct attack on the competence of an attorney and constitutes a waiver of the attorney-client privilege.**" *State v. Moreno*, 128 Ariz. 257, 260, 625 P.2d 320, 323 (1981); *State v. Griswold*, 105 Ariz. 1, 5, 457 P.2d 331, 335 (1969).

Under a direct ineffective assistance of counsel claim, an attorney should be allowed to defend himself, at least with regard to the particular contentions asserted, by revealing "at least that much of what was previously privileged as is necessary...." *Moreno*, 128 Ariz. at 260, 625 P.2d at 323; *State v. Zuck*, 134 Ariz. 509, 515, 658 P.2d 162, 168 (1982). *State v. Cuffle*, 171 Ariz. 49, 52, 828 P.2d 773, 776 (1992).

Interestingly, *Cuffle* dealt with an implied IAC claim. On that point, the court said that a defendant will not be allowed to use the attorney-client privilege as a shield to block inquiry into an issue that he has raised.

One distinguishing fact of note is that the court compelled the attorney to testify; he did not provide any affidavit. But that case was a little different, and the State had filed a motion for the trial court to find waiver of attorney/client privilege in order to be able to call the defendant's previous counsel. Now, the Arizona Supreme Court has said that an IAC claim amounts to waiver regarding information that previous counsel has in response to the claim.

Note that the ABA opinion post-dates *Cuffle*, and that the ABA opinion is a persuasive authority.

We only want to do this once, right? *What happens when a convicted defendant claims ineffective assistance of counsel, and trial counsel declines to defend against it or admits ineffectiveness*

If counsel still will not provide an affidavit and an EH is granted, testimony may still be favorable. Perhaps request a court-ordered interview in order to better prepare for the evidentiary hearing and let trial counsel know that you are accommodating their ethical concerns. Subpoena trial counsel for the hearing.

If trial counsel is going to testify as a witness for the defense, and they have provided the convicted defendant with an affidavit of ineffectiveness, then focus on the standard for ineffectiveness and emphasize lack of prejudice in your pleading. Sometimes it is compelling to disagree with counsel's assessment of their own effectiveness, and sometimes it is futile.

If the defendant pled guilty, the standard for ineffectiveness is different (*State v. Bowers*, 192 Ariz. 419, 422, 966 P.2d 1023, 1026 (App. 1998):

In ***Hill v. Lockhart***, 474 U.S. 52, 58 (1985), the Supreme Court held that the **two-part test** announced in *Strickland v. Washington*, 466 U.S. 668 (1984), applied to challenges to guilty pleas induced through ineffective assistance of counsel. In this context, the Court held, the element of prejudice focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the "prejudice" requirement, **the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.**

Making a record when plea counsel's pre-conviction conversations with the defendant are at issue:

The burden is on the defendant to clearly establish that he would have gone to trial. This will depend on his motivation for taking the plea, which may be related to the strength of the trial evidence against him. Test the likelihood that the claimed ineffectiveness is actually linked to prejudice, and also challenge the credibility of the ineffectiveness claims.

We only want to do this once, right? *What happens when a convicted defendant claims ineffective assistance of counsel, and trial counsel declines to defend against it or admits ineffectiveness*

From *Bowers*: "[I]t is by no means obvious how a court is to determine the probability that a defendant would have gone to trial. It is clear enough that a defendant must make more than a bare allegation that he 'would have pleaded differently and gone to trial,' ... but it is not clear how much more is required of him." *United States v. Horne*, 987 F.2d 833, 835–36 (D.C.Cir.1993). Some courts have found a mere allegation that a defendant would have gone to trial is sufficient, *see Ostrander v. Green*, 46 F.3d 347, 353 (4th Cir.1995), *overruled in part on other grounds by O'Dell v. Netherland*, 95 F.3d 1214, 1222 (4th Cir.1996); *United States v. Giardino*, 797 F.2d 30, 32 (1st Cir.1986), but most have required a more complete statement. *See United States v. LaBonte*, 70 F.3d 1396, 1413 (1st Cir.1995), *reversed on other grounds*, 520 U.S. 751, 117 S.Ct. 1673, 137 L.Ed.2d 1001 (1997); *Key v. United States*, 806 F.2d 133, 139 (7th Cir.1986); *Doganiere v. United States*, 914 F.2d 165, 168 (9th Cir.1990); *United States v. Gordon*, 4 F.3d 1567, 1571 (10th Cir.1993); *State v. Bentley*, 201 Wis.2d 303, 548 N.W.2d 50, 55 (1996).

Here are some potential short-comings in your defendant's petition to point out:

Did the defendant demonstrate that plea counsel failed to do something that might have changed the result? (Defendant must show that counsel's failure to act fell below prevailing professional norms. *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006).)

Did the defendant demonstrate that competent counsel would have explored any unspoken reasons for accepting a plea or rejecting an original plea in an effort to correct any potential misconceptions the defendant may have had?

Is the defendant's only argument on review that advising a client to plead guilty solely to increase the likelihood of a lesser sentence "is not effective assistance of counsel?" (If so, this is not a colorable claim because plea counsel had a reasoned basis. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68. Even if a defendant might decide "to go to trial, knowing that if he were convicted ... the penalty would not be more serious than that specified in the plea offer," that determination would have been relevant to the court's assessment of prejudice, not to its conclusion that counsel was ineffective. *State v. Ysea*, 191 Ariz. 372, ¶¶ 17, 21, 956 P.2d 499 (1998).).

Does the defendant establish an *actual* connection between his plea counsel's alleged ineffectiveness and his decision to plead guilty? See Ysea, 191 Ariz. 372, ¶ 17, 956

P.2d at 504 ("To establish prejudice in the context of a plea agreement, a defendant must show a reasonable probability that except for his lawyer's error he would not have waived his right to trial and entered a plea ."). (Conversations from previous hearings, including sentencing, and emails leading up to the change of plea can help you argue this area.)

Reporting to the bar:

Reporting ineffectiveness provides a disincentive to those who are too willing to admit ineffectiveness in order to undo the State's case in the post-conviction proceeding. It can also give a conscientious defense attorney pause from falling on his sword unnecessarily. But reporting must be evaluated on a case-by-case basis in order to avoid the appearance of gaining in improper advantage in post-conviction cases.

Arizona Ethics Opinion 98-02 says that admitted ineffective assistance of counsel still must be substantial and involve another lawyer's honesty, trustworthiness or fitness as a lawyer in other respects before a duty to report arises. The reporting attorney must be careful not to suggest or permit the suggestion that the report is a threat to gain advantage in the post conviction proceedings. The question about whether to report certainly does not hinge on the criminal proceeding but it does depend on a case by case analysis, and it will also depend upon your office's stance on reporting admitting ineffective defenders.

Smart Phones are challenging our understanding of the Fourth Amendment and its protections.

For one thing, Smart phones are targets of everyday criminal activity because they easily facilitate crime.

Secondly, smart phones make it possible to carry all of our private, personal information everywhere. Their format brings into question the scope of a search, like on a computer.

Next, that information can be accessed and edited from remote locations, putting exigency at issue for the search of a seized item.

Lastly, the contents of a smart phone do not exist solely on the device; they are often stored in an electronic storage service, making the contents of a smart phone both subject to subpoena and difficult to inventory.

Oftentimes, a cell phone will be seized as the result of a search incident to arrest. *US v. Finley*, a Fifth Circuit case, **allows for the search of the phone as a container**:

> The permissible scope of a search incident to a lawful arrest extends to containers found on the arrestee's person. *United States v. Johnson*, 846 F.2d 279, 282 (5th Cir.1988) (per curiam); *see also New York v. Belton*, 453 U.S. 454, 460–61 (1981) (holding that police may search containers, whether open or closed, located within arrestee's reach); *United States v. Robinson*, 414 U.S. 218, 223-24 (1973) (upholding search of closed cigarette package on arrestee's person).

United States v. Finley, 477 F.3d 250, 260 (5th Cir. 2007).

The defendant in *Finley* argued that the phone was like a closed container that required a warrant to be opened. He was wrong because an exception to the warrant requirement applied, but he cited *Walter v. United States*, 447 U.S. 649 (1980), which gives guidance for when a warrant is required to review the contents of a closed container:

> Even though the cases before us involve no invasion of the privacy of the home, and notwithstanding that the nature of the contents of these films was indicated by descriptive material on their individual containers, we are nevertheless persuaded that the unauthorized exhibition of the films constituted an unreasonable invasion of their owner's

> constitutionally protected interest in privacy. It was a search; there was no warrant; the owner had not consented; and there were no exigent circumstances.

Walter v. United States, 447 U.S. 649, 654 (1980).

In Ohio, the court has made an assertive **move away from viewing smart phones as closed containers**, and attributed a higher degree of privacy to them. *State v. Smith*, 124 Ohio St. 3d 163, 168, 920 N.E.2d 949, 954 (2009).

Certainly, smart phones are more sophisticated than any other type of closed container, which presents not only new privacy questions but also bigger threats to preserving their evidentiary value.

For example, smart phone contents may be destroyed at any time remotely. This practice is recommended to the general public to protect private information from thieves:

> If a person's smart phone is lost or stolen, he or she may now contact the carrier and ask to have that device remotely disabled. If a smart phone is rendered inactive in such a manner, it's often considered to be as useful as a "brick." These "bricked" phones are of little use to thieves because they can't be reactivated after being sold on the black market. The MPD is encouraging victims of smart phone thefts to call their carriers and to "brick it" in an effort to deter smart phone theft.

DC Metropolitan Police Department <http://mpdc.dc.gov/page/stolen-smart-phone-brick-it>

This might help preserve the contents on the phone for later examination:

Faraday box

But new technology still threatens the integrity of the collected evidence, because smart phone data can be stored and modified in a cloud data storage service. Therefore, **exigent circumstances might apply** if the facts show that the evidence on the smart phone device could be destroyed:

> [T]he need "to prevent the imminent destruction of evidence" has long been recognized as a sufficient justification for a warrantless search. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006); *see also Georgia v. Randolph*, 547 U.S. 103, 116, n. 6 (2006); *Minnesota v. Olson*, 495 U.S. 91, 100 (1990).

Kentucky v. King, 131 S. Ct. 1849, 1856-57 (2011).

If there is a passcode on the seized smart phone, the defendant might argue that the Fifth Amendment protects him from helping the State unlock the phone. This is truly a Rule 15 issue. But in the meantime, it might be possible to **subpoena information from the cloud storage service**. A search warrant to the cloud storage service will also work. But due to the nature of cloud storage services, the search will not be narrowly tailored.

As we know, **courts reject general warrants and general searches**. Darren Kafka, Propping Up the Illusion of Computer Privacy in United States v. Burgess, 87 Denv. U. L. Rev. 747, 763 (2010), *citing Maryland v. Garrison*, 480 U.S. 79, 84 (1987). So the State's argument must emphasize the **reasonableness of a broad computer search**. See *United States v. Burgess*, 576 F.3d 1078, 1092 (10th Cir. 2009) ("While '[o]fficers must be clear as to what it is they are seeking on the computer and conduct the search in a way that avoids searching files of types not identified in the warrant,' *United States v. Walser*, 275 F.3d 981, 986 (10th Cir.2001), 'a computer search may be as extensive as reasonably required to locate the items described in the warrant' based on probable cause."); *United States v. Gray*, 78 F. Supp. 2d 524, 529 (E.D. Va. 1999) ("[S]earches of computer files 'present the same problem as document searches—the intermingling of relevant and irrelevant materials—but to a heightened degree' because of the massive storage capacity of modern computers. *United States v. Hunter*, 13 F.Supp.2d 574, 583 (D.Vt.1998); *see also* Raphael Winick, 'Searches and Seizures of Computers and Computer Data,' 8 Harv.J.L. & Tech. 75, 78 (Fall 1994). Thus, although care must be taken to ensure a computer search is not overbroad, searches of computer records 'are

no less constitutional than searches of physical records, where innocuous documents may be scanned to ascertain their relevancy.' *Hunter*, 13 F.Supp.2d at 584.")

One question that might arise is whether a content search of a seized smart phone is subject to the statutory deadline for warrants. A search warrant that is not fully executed can go stale after five days since there is a legal presumption that the underlying probable cause dissipates after that time. *State v. Miguel*, 209 Ariz. 338, 340-41, 101 P.3d 214, 216-17 (App. 2004); *see also* A.R.S. § 13-3918 (provides five days to execute warrant and three days to return it). But as long as it was properly seized and the contents are within the scope of the State's authority to search, then the State can argue that it is the same as a cabinet's worth of seized documents. *See United States v. Gray*, 78 F. Supp. 2d 524 (E.D. Va. 1999).

Ultimately, the discussion could come down to reasonableness under the Fourth Amendment, but it is **possible to successfully argue that the Fourth Amendment will not apply to the contents of a legitimately seized phone since a defendant has no compelling argument for expectation of privacy**:

United States v. Rigmaiden, 2013 WL 1932800 (D.Ariz. 2013): Fourth Amendment provides no specific time limit in which the government may conduct forensic examination of a computer that has been seized pursuant to a search warrant.

Hell's Angels Motorcycle Corp. v. McKinley, 360 F.3d 930, 933-34 (9th Cir.2004): When items are lawfully seized and then examined by police, a subsequent examination by a law enforcement officer does not result in a constitutional violation.

United States v. Johnson, 820 F.2d 1065, 1071-72 (9th Cir. 1987): No warrant or further justification was required where police conducted a valid search incident to a lawful DUI arrest, seized currency from the defendant's pocket, and in a later investigation for a separate crime, examined the serial numbers on the bills.

Dismissals without Prejudice
Presented by Jacob R. Lines
March 28, 2014

The problem: Judges dismissing cases with prejudice instead of without prejudice.

How does this come up?

Almost any time a dismissal is sought. It comes up most often in our misdemeanor cases. For example, if we have to dismiss because witnesses don't come, or blood testing is not done. It also arises when the defense asks for a dismissal.

How do we handle it at trial?

First, we read Rules 16.6(d):

> d. Effect of Dismissal. Dismissal of a prosecution shall be without prejudice to commencement of another prosecution, unless the court order finds that the interests of justice require that the dismissal be with prejudice.

Then we read the cases. The basics are as follows. The default is dismissal without prejudice. "Thus, although '[t]he trial court has the inherent power to dismiss a prosecution,' it may not dismiss an indictment with prejudice absent a finding that 'the interests of justice' require it." *State v. Huffman*, 222 Ariz. 416, 420, ¶ 10, 215 P.3d 390, 394 (App. 2009), *quoting State v. Hannah*, 118 Ariz. 610, 611, 578 P.2d 1039, 1040 (App. 1978). Next, the court needs to make a reasoned finding about the interests of justice.

> "[A] 'reasoned finding' demands more of a trial court than the rote recitation into the record of the legal incantation 'interests of justice' in order to meet the requirements of [Rule 16.6]. In our opinion, the rule requires the trial court to state on the record its reasons for concluding that dismissal with prejudice is in the interests of justice. This statement must be based on a particularized finding that to do otherwise would result in some articulable harm to the defendant."

State v. Wills, 177 Ariz. 592, 594, 870 P.2d 410, 412 (App. 1993)

Generalized fears are not enough. Perhaps the trial court thinks that dismissal with prejudice is appropriate "either because finality, as a general matter, is desirable in criminal prosecutions and/or delay can result in prejudice because memories dim and evidence is lost." The Court of Appeals says that "[s]uch generalizations will not support a dismissal with prejudice." *State v. Granados*, 172 Ariz. 405, 407, 837 P.2d 1140, 1142 (App. 1991).

The most important consideration is whether a delay will result in prejudice to the defendant. The kind of harm that justifies dismissal with prejudice is impairment of the defendant's ability to defend against charges. *In re Arnulfo G.*, 205 Ariz. 389, 391, ¶ 9, 71 P.3d 916, 918 (App. 2003); *State v. Gilbert*, 172 Ariz. 402, 404-05, 837 P.2d 1137, 1139-40 (App. 1991).

Here are some cases that may help:

State v. Garcia, 170 Ariz. 245, 823 P.2d 693 (App. 1991): the State moved to dismiss a drug case within two months of the defendant's arrest. The trial court granted the motion, "provided that after ninety days the dismissal would be with prejudice unless the state convinced the court that it should be otherwise." Before the ninety days expired, the State asked the court to extend the time, explaining that Garcia was under investigation for another crime that might be consolidated with the first case, that the police had issued search warrants and seized evidence in the first case that needed to be analyzed, and that the case would require follow-up investigation. The defense responded that the State was seeking a tactical advantage, hoping that a confidential informant who was a critical witness would become unavailable for trial. The trial court denied the State's request for more time, saying that the dismissal with prejudice had already taken effect automatically because the 90 days expired before the hearing.

The record showed that the trial judge did not dismiss because the State was seeking to gain a tactical advantage; the judge believed that the dismissal had automatically become with prejudice at the expiration of 90 days. If Garcia could support his allegation about the State delaying for a tactical advantage, that might be cause for dismissal later, but the Court of Appeals would not address it on the existing record.

The court then moved on to the next argument – that the State was attempting to avoid an impending time limit. Because a Rule 8 time violation does not require a dismissal with prejudice, not every attempt to avoid an impending time limit merits dismissal with prejudice. The court held that "the same considerations discussed in the cases construing Rule 16 govern whether a dismissal for a Rule 8 violation should be with or without prejudice" – if a defendant can show that the State delayed to gain a tactical advantage or to harass him, and if he can show that he actually suffered prejudice as a result, dismissal with prejudice would be justified. Because Garcia did not make that argument, it could not support the dismissal with prejudice.

Finally, the court declared that it "[did] not favor the automatic conversion of a dismissal without prejudice into a dismissal with prejudice." Rule 16.6 "requires a reasoned finding," and "[t]he judge is required to actually weigh the factors that bear on the issue." Converting a dismissal without prejudice into a dismissal with prejudice because of an arbitrary time limit "is less than the rule contemplates."

State v. Granados, 172 Ariz. 405, 837 P.2d 1140 (App. 1991): the State moved to dismiss without prejudice on the day of trial. The trial court granted the motion but ordered that if the State did not refile the case within 60 days, it would dismiss the case with prejudice. Granados later moved to dismiss with prejudice, arguing that the interests of justice required a dismissal with prejudice because Granados and the victim (his daughter) and her family were in Mexico, and the state was not able to proceed with the prosecution. The state conceded that the parties were in Mexico, and it was not able to assure the judge when and if they would return, or be returned, to Arizona. In addition, the victim had partially recanted her accusation and no longer seemed interested in pursuing the prosecution. The State argued that justice would not be served by a dismissal with prejudice and that such a dismissal would reward the defendant for leaving the country. The trial judge dismissed the charges against the defendant with prejudice and the State appealed.

The Court of Appeals, finding no prejudice established, reversed. First, the fact that a defendant is not in the country and that there will be a delay before the charges can be refiled is not automatically prejudicial. It quoted *United States v. Marion*, 404 U.S. 307, 325-26 (1971):

> [A] real possibility of prejudice [is] inherent in any extended delay, such as dimming of memories, lost evidence and witnesses becoming inaccessible. In light of applicable statutes of limitations, the possibilities are not enough by themselves to demonstrate that no fair trial is possible.

Next, "nothing in the fact that the alleged victim partially recanted the accusation or seems uninterested in pursuing the prosecution" justified dismissal with prejudice. The State has discretion to prosecute cases and has an interest in enforcing the law regardless of the wishes of the victim. The court also agreed that "a dismissal with prejudice in this case tends to reward the defendant for leaving the jurisdiction."

Finally, the court noted that it "disapprove[s] of automatically converting a dismissal without prejudice into one with prejudice by the mere lapse of an arbitrarily set period of time. That practice undercuts the reasoned application of Rule 16."

State v. Rasch, 188 Ariz. 309, 935 P.2d 887 (App. 1996): the prosecutor sent the victim a letter explaining her rights. The victim told the prosecutor that she wanted to speak only with him. Defense counsel later told the prosecutor that he wanted to interview the victim, but the prosecutor did not relay that request to the victim.

The victim testified at trial. She said that the prosecutor never told her that defense counsel had requested an interview with her. She said that if she had been informed, she would have agreed to the interview. The prosecutor admitted that he violated the statutory obligation to inform the victim of defense counsel's interview request.

The defendant moved to dismiss the case for a violation of his due process rights. The trial court found that the prosecutor's mistake was not intentional but was the result of a miscommunication. It found no prosecutorial misconduct. Nonetheless, it dismissed the case with prejudice.

On appeal, the Court of Appeals reversed. It explained that a case may be dismissed with prejudice when a prosecutor "knowingly engages in improper and prejudicial conduct indifferent to the fact that such conduct will likely result in a mistrial or dismissal," but that conduct "due to legal error, negligence, or mistake does not meet this condition." For a dismissal with prejudice, the defendant needed to show intentional conduct that caused prejudice to the defendant. Because the mistake was inadvertent, the trial court erred in dismissing with prejudice.

In re Arnulfo G., 205 Ariz. 389, 71 P.3d 916 (App. 2003): the State requested that the case be dismissed without prejudice because it made a mistake in charging the case. The trial court dismissed with prejudice, expressing that it was "very concerned about the fact that because of the age, the juvenile's age, that he would be subject to prosecution in adult court under the circumstances for the same – for the same offenses." The Court of Appeals reversed, holding that, "[e]ven if this were the type of legally cognizable prejudice that would impair Juvenile's ability to defend himself against such charges, which it is not, Juvenile has still failed to demonstrate, and the court failed to find, that any such prejudice to Juvenile was the result of any deliberate conduct by the state."